Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

BARRY NAKELL, Petitioner,

v.

ATTORNEY GENERAL OF NORTH CAROLINA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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125 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does due process require that the criminal contempt hearing for an attorney be held before a different judge where the trial judge (a) had become "personally embroiled" with the attorney and his client; (b) outside of court before the contempt hearing gave an interview to a reporter in which he told the reporter that the attorney had been disruptive and encouraged his client to be disruptive, and the newspaper reported that interview on the morning of the contempt hearing; and (c) outside of court before the contempt hearing asked witnesses to provide affidavits for the contempt hearing and read the affidavits without placing them in the record?

2. Does it violate due process for a trial judge to proceed with a summary rather than a plenary contempt hearing where the judge waits to hold the contempt hearing until two days after the conclusion of the proceedings at which the alleged contempt occurred?

3. Does it violate due process if an attorney who, after being permitted to speak on behalf of his client in a criminal case, is then wrongfully denied his right to do so, and is convicted of criminal contempt because he politely and courteously persists in trying to explain to the trial judge the legal basis for his right to represent his client, or because his client engages in outbursts in response to the trial judge's efforts wrongfully to silence the attorney?

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   (2) THE JUDGE HAD BECOME "PERSONALLY EMBROILED" WITH PETITIONER AND HIS CLIENT;

(3) THE JUDGE OUTSIDE OF COURT HAD REQUESTED WITNESSES TO PROVIDE AFFIDAVITS AND HAD READ THEM; AND
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Petitioner Barry Nakell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on January 27, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 15 F.3d 319 (4th Cir. 1994), and is reprinted in Appendix A. The Order of the United States District Court for the Eastern District of North Carolina is not reported, and is reprinted in Appendix B.

JURISDICTION

The decision of the Court of Appeals was filed on January 27, 1994. The Court of Appeals denied a timely petition for rehearing on March 4, 1994. The

jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment XIV:

(N)or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case presents a challenge to the constitutionality of a criminal contempt conviction of a criminal defense attorney. The contempt conviction arose out of the following circumstances:

(1) December 6, 1988 - July 7, 1989

On December 6, 1988, Eddie Hatcher was indicted in the Superior Court of Robeson County on 14 counts of kidnapping. The next day, on December 7,

1988, Hatcher was brought before the Court, Judge Robert H. Hobgood presiding, for his first appearance. Hatcher was represented by Petitioner Barry Nakell, who entered a limited appearance pursuant to N.C. G.S. Section 15A-141(3), and by Ronald L. Kuby, a member of the New York Bar, who was admitted by order of Judge Hobgood pro hac vice in association with the limited appearance of Nakell.

After the hearing, Judge Hobgood appointed private counsel Freda Bowman to enter a general appearance on behalf of Hatcher. On January 3, 1989, Angus Thompson was sworn in as the first Public Defender for Robeson County. Bowman joined Thompson's office as an Assistant Public Defender. On January 26, 1989, Superior Court Judge Anthony Brannon,

"sua sponte," entered an order transferring the representation of Hatcher from Bowman to Thompson.

On July 7, 1989, upon written application of Hatcher, without objection by the District Attorney, Superior Court Judge Dexter Brooks entered an order admitting William M. Kunstler and Kuby pro hac vice as counsel for Hatcher in association with Public Defender Thompson as local counsel. Kunstler and Kuby, like Nakell, were serving without fee.

(2) September 5-25, 1989

Hatcher's arraignment was scheduled for September 5, 1989. In advance of the hearing, Nakell again filed a notice of limited appearance, pursuant to N.C. G.S. Section 15A-141(3).

The arraignment was called before Superior Court Judge Robert L. Farmer. Judge Farmer, without speaking to counsel or giving them any opportunity to be heard, read an order that he had prepared "sua sponte," without notice to the parties or request by any of them, in which he purported to overrule the order of July 7 admitting Kunstler and Kuby in association with Thompson, and provided: "IT IS HEREBY ORDERED that the Public Defender of Judicial District 16B is the only counsel of record for the defendant at this time." That order was unlawful under North Carolina law, which prohibits one Superior Court Judge from overruling an order issued by another in the same

action.[1]

Thompson proceeded to introduce Nakell to the Court as a licensed North Carolina attorney entering a limited appearance on a pro bono basis for the arraignment and for two complex motions to dismiss the indictment. The Court refused to hear Nakell.[2] This order was

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[1] Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); see also, NCNB v. Virginia Carolina Builders, 307 N.C. 563, 566-7, 299 S.E.2d 629, 631 (1983); Holly v. Burroughs Wellcome Co., 56 N.C.App. 337, 344, 289 S.E.2d 393, 397 (1982). For that reason, the North Carolina Supreme Court later vacated Judge Farmer's order on a petition brought by Nakell. State v. Hatcher, 362 N.C. 52, 389 S.E.2d 100 (1990).

[2] At that point, Hatcher said: "I will represent myself." Judge Farmer told him: "Let your attorney speak for you -- " Hatcher then discharged Thompson and Thompson moved to withdraw. The Court denied that motion.

The next day, Judge Farmer signed

also unlawful under North Carolina law, which permits a North Carolina attorney to appear in a case by entering a notice of appearance or of limited appearance, without any action by the trial judge being required.[3]

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another "sua sponte" order outside of court providing that the public defender was Hatcher's counsel until Hatcher files a written notice "that he plans to represent himself . . . or that he has retained counsel licensed in North Carolina along with their name and address and a notice of general appearance filed by said attorney with the Court."

[3] N.C. G.S. section 15A-141(3) provides:

> An attorney enters a criminal proceeding when he:
>
> (1) Files a written notice of entry with the clerk indicating an intent to represent a defendant in a specified criminal proceeding; or
>
> (2) Appears in a criminal proceeding without limiting the extent of his representation; or
>
> (3) Appears in a criminal proceeding for a limited purpose and indicates the

On September 25, 1989, Hatcher--through Thompson and Nakell as his attorneys--filed a Motion For Reconsideration of Order Removing Counsel From Defendant's Defense Team. On October 16, 1989, Judge Farmer outside of court denied the motion as to Kunstler and Kuby and did not address the status of Nakell. His Conclusions of Law stated

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extent of his representation by filing written notice thereof with the clerk . . . .

The Official Commentary to that section specifies:

> This section lists the ways in which an attorney enters a criminal case. Two of them involve filing written documents with the clerk. . . . There is no restriction on the attorney's right to enter the case for a limited purpose, if he files written notice of the limitation . . . .

in part:

> If the retained[4] out-of-state attorneys associate the Public Defender to appear with and assist them in the case, then the Public Defender is engaging in the private practice of law and is subject to being charged with a misdemeanor and fine pursuant to G.S. 84-2 as well as any disciplinary action by the N.C. State Bar regarding his license to practice law. If the out-of-state attorneys conspire to have the Public Defender violate G.S. 84-2, then said attorneys could be subject to being charged with a misdemeanor and if convicted, sentenced pursuant to G.S. 14-3.[5]

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[4] It bears repeating that the out-of-state attorneys as well as Nakell were volunteering to serve without fee. Thompson made this point clear at the arraignment.

[5] This theory is obviously groundless. Private counsel regularly associate with public defenders in the public interest in North Carolina. Accordingly, the North Carolina Supreme Court implicitly rejected the theory when it vacated Judge Farmer's order in State

(3) November 14, 1989

In the morning of November 14, 1989, the District Attorney's office advised Thompson that Hatcher's case would be called for hearing that very afternoon at 4:00 before Judge I. Beverly Lake, Jr. Thompson immediately telephoned Nakell to advise him of the hearing. By conference call, Thompson and Nakell advised Hatcher in prison of the hearing. Hatcher asked Nakell to represent him at the hearing together with Thompson. Nakell agreed only after Hatcher--who had engaged in outbursts during previous court appearances--assured Nakell and Thompson, upon their insistence, that he would refrain from outbursts.

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v. Hatcher, supra.

That morning Thompson and Nakell as counsel for Hatcher filed a second motion for reconsideration that coincidentally had been prepared for filing that day before the hearing was set. This motion explained why the "private practice of law" rationale that Judge Farmer had presented for the first time in his order denying the first motion for reconsideration was insupportable.

That afternoon Nakell filed with the courtroom clerk a notice of limited appearance that recited that it was pursuant to Section 15A-141(3).

Judge Lake recited the previous orders of Judges Brannon and Farmer, but not those of Judges Hobgood or Brooks, and noted that he had

received a second motion for

> reconsideration of order removing counsel from the defendant's defense team. That was received this morning, and appears to be signed by Mr. Angus Thompson, Public Defender, and Mr. Barry Nakell of Chapel Hill on behalf of the defendant.
>
> That paper writing requests the reinstatement -- the Court's consideration of the reinstatement of Mr. Kunstler and Mr. Kuby to appear in this case on behalf of the defendant in association with the public defender. This writing also requests the Court to consider -- or clarify the status of Mr. Barry Nakell, requesting that he be permitted to enter a limited appearance in the case.

Judge Lake then noted that Judge Farmer's order specified that Thompson "is the attorney, the only attorney of record for the defendant." He then began discussing Hatcher's motion to represent himself. That motion made clear that Hatcher's preference was to be

represented by Kunstler, Kuby and Nakell in association with Thompson. Accordingly, Nakell rose and addressed the Court politely: "Your Honor, before the Court addresses that, may I be heard briefly? My name is Barry Nakell, Your Honor." The Court responded: "No, sir, not at this--not at this time." (Emphasis added.)

Judge Lake began to address again the second motion for reconsideration, and Thompson interrupted him politely asking to be permitted to file "a transcript of the December 7 proceeding in this case where Ron Kuby was allowed to enter pro hac vice." Judge Lake allowed that. Nakell then addressed the Court again: "Your Honor, if I might be heard briefly, also, with regard to that.

At that same proceeding, I was allowed to make a limited appearance in this case by Judge Hobgood and so I've been continuing in this case in that regard, and I did file today a notice of limited appearance for the proceeding today." Judge Lake acknowledged that and said it was not in compliance with Judge Farmer's order. Nakell asked, "May I speak to that for a moment, Your Honor?" and there followed a discussion between Nakell and the Court about the matter. Judge Lake then told Nakell, "I'm not going to hear you." Nakell said, "But I simply want to point out, Judge, that there are --" Judge Lake interrupted him: "I said I'm not going to hear you. Sit down."

In response to Judge Lake's statement--and not to anything Nakell

said--Hatcher engaged in an outburst of protest. Judge Lake asked Hatcher if he wanted "to be removed from this courtroom," at which point Nakell said: "Your Honor, I simply want to point out that the difficulty in that perspective is that there are two orders. There are conflicting orders in this case." Judge Lake told Nakell to sit down. "That's a direct order from the Court." Nakell said, "Your Honor --" when Hatcher interrupted with another outburst, calling the Court "a racist, segregated, son-of-a-bitch you." Nakell explained: "Your Honor, in a very polite manner, I'm simply trying to be of assistance to the Court." Judge Lake directed him "to sit down and be quiet." Nakell complied.

Hatcher then engaged in a series of

outbursts and a colloquy with the Court. Hatcher accused Judge Lake of "committing a criminal act" by not following Judge Brooks' order. Judge Lake threatened to have Hatcher "tied and gagged." Hatcher asked: "Like your father would?" Judge Lake responded: "Yes, sir, I think so. Yes, sir."

Thompson then addressed the Court and corrected one misstatement that Nakell made. Nakell apologized for his mistake and explained his position notwithstanding that mistake. Judge Lake permitted Nakell to make his statement and told Nakell that he understood what Nakell was telling him. Nakell responded: "Thank you, Your Honor." Judge Lake then continued to recite his understanding of the status of the pro hac vice requests

and Nakell rose to speak to that. Judge Lake responded to what Nakell said, concluding by saying: "All right." Nakell then explained one other point to the Court, and Judge Lake said: "Judge Farmer, Mr. Nakell -- and, again, I'm going to direct you not to interrupt me now. If you want to --" Nakell apologized: "I'm sorry. I thought you had finished, Your Honor."[6]

Judge Lake then told Nakell, "If you want to pose a question to the Court, you do so through Mr. Thompson." Nakell then politely explained that he was "a little bit in limbo in this because Judge Farmer did not address the question of my

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[6] The transcript is clear that Judge Lake did give the impression that he had finished, having concluded with "All right."

participation." Judge Lake said: "Well, I am doing so." Nakell said, "I don't understand any basis --" Judge Lake said: "The Court "does not recognize your representation of this defendant." Nakell politely inquired about the basis for that. Judge Lake said simply, "Judge Farmer's order." Nakell began to discuss that respectfully when Judge Lake directed him "to sit down and be quiet and not say another word to the Court except if you want to say something, do it through Mr. Thompson."

Nakell turned to Thompson. Looking directly at him, in the same tone of voice, he asked Thompson to inquire about the "legal basis for [prohibiting] a licensed North Carolina attorney from appearing on behalf of a defendant in a

criminal case in association with a public defender --" Judge Lake called Nakell's name. Hatcher responded with an obscenity. Judge Lake directed the bailiff to remove Nakell. Nakell was escorted from the courtroom. As Nakell was leaving, Hatcher threw a pen at the bench.

Judge Lake called a recess. Nakell and Thompson persuaded Hatcher to conduct himself properly upon the resumption of the hearing.

Judge Lake concluded the proceedings with Hatcher. He then advised Nakell that he was "considering holding you in direct criminal contempt for your conduct before the Court this afternoon. The Court is going to release you now, but directs that you be back before this Court with

counsel, if you desire, for a further consideration of this matter by the Court. The Court directs you to do so on Thursday evening at 2:30."

Nakell requested a specification of the charge and also requested that Judge Lake schedule his return for another date because he had plans to travel out of state the next day. Judge Lake gave Nakell a specification of the charge[7] but

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[7]

THE COURT: . . . But as to your specification, you refused, in fact, to sit down when the Court gave you a direct order to do so. You refused to be quiet. You continued to speak over the Court. You were disruptive of the proceedings. You unduly prolonged the proceedings.
I think those are specific enough.
MR. NAKELL: I'm not --
THE COURT: It appeared clear to the Court that you were pandering to the audience and

denied his request for a postponement: "I'm afraid you need to postpone your plans." Nakell also requested "more time to obtain counsel, to obtain a transcript of the proceeding, to be able to confer with counsel and prepare for this proceeding." Judge Lake responded: "I'll take that under consideration. But in the meantime, I'll expect to see you here Thursday afternoon at 2:30."

(4) November 15, 1989

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to the defendant and that you were encouraging the defendant, Eddie Hatcher, to be disruptive of the Court. Yes, sir, that is specification.
MR. NAKELL: Your Honor, again, specifically, what is it that I did that either encouraged Mr. Hatcher or otherwise constituted contempt?
THE COURT: I think that's specific enough for you, Mr. Nakell. You know what you did. You might even be able to see it tonight.

Judge Lake granted an interview about the case to a newspaper reporter, in which he said that "Nakell had been disruptive of the proceedings, pandering to the audience and the defendant, and encouraging Mr. Hatcher to be disruptive."

Judge Lake also personally approached several persons who had attended the proceeding and asked them to provide affidavits of what they observed. These included the District Attorney, Thompson, Bowman, another Assistant Public Defender,[8] and the court reporter.

(5) November 16, 1989

On the morning of November 16, an

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[8] His affidavit states that it was made on Judge Lake's "order."

article appeared in the Raleigh News and Observer that quoted Judge Lake as saying in his interview out of court: "The judge said . . . Mr. Nakell had been 'disruptive of the proceedings,' 'pandering to the audience and the defendant' and encouraging Mr. Hatcher to be disruptive."

Judge Lake commenced the hearing by asking the District Attorney if he wanted to be seated in the audience or at counsel table. The District Attorney responded: "Either way, Your Honor. I'm not sure what my role is in this." Judge Lake then said: "All right, sir. Well, perhaps we'll get that clarified." Judge Lake then noted the affidavits that he had solicited and provided copies to Nakell and his counsel. In response to a

question from Nakell's counsel, Judge Lake said: "At this point the Court intends to further give Mr. Nakell opportunity to respond to the charges specified." When counsel asked whether the hearing was plenary or summary, Judge Lake said only: "This is a continuing hearing." Shortly he explained he was "continuing to proceed summarily," and, again: "As I said, this is a summary proceeding." Nakell's counsel objected to the summary procedure and asked the Court to prepare a written order returnable at a later date. He asked that it be made returnable before a different judge on three grounds: (1) Judge Lake was personally embroiled in the proceedings; (2) Judge Lake had given an interview to the press; and (3) Judge

Lake had solicited affidavits from witnesses. Judge Lake acknowledged his interview with the press and his soliciting of affidavits, but he denied the motions. Judge Lake also denied a motion to recuse himself.

Nakell's counsel observed that he had just been given the affidavits and a transcript of the earlier proceeding and requested an opportunity to review them and interview potential witnesses to prepare for a hearing. Judge Lake granted only 30 minutes. The only reason he gave for refusing more time was that he was scheduled to sit in Robeson County "this week only."

After a 30 minute recess, Nakell's counsel advised the Court that he was still not adequately prepared, noting

that he was not versed in the law on this matter and that he had no opportunity to contact other people who had been in the courtroom in addition to those Judge Lake had solicited for affidavits. Judge Lake responded: "Nor have I."

Nakell then called three witnesses and Judge Lake called one witness, the District Attorney. Public Defender Thompson and an Assistant Public Defender testified that Nakell addressed Judge Lake in a respectful tone and did not attempt to disrupt the proceedings or encourage Hatcher's disruptive behavior.

Nakell testified that he did not intend to disrupt the proceedings and did not believe that he had. In the conference call with Hatcher and Thompson that morning, he obtained assurances from

Hatcher that he would allow Nakell to speak for him and that he would not speak for himself.

Nakell testified that when Hatcher cursed and threw a pen at the bench, the bailiff had already taken him by the arm and he was gathering up his papers. He did not see Hatcher throw the pen and did not even hear Hatcher say anything at that time. At the recess when Nakell had his first opportunity to talk with Hatcher, he specifically told Hatcher that he should not have engaged in his outbursts and should not do so in the rest of the proceeding.

Judge Lake examined Nakell at length. That examination concluded as follows:

MR. NAKELL: . . . I think that

this was a situation in which the Court asked me not to speak at this time; later allowed me to speak; asked me to sit down; later entertained my speaking; allowed me to be heard; engaged in colloquy with me; and only then asked me to stop--made a definitive statement that I should stop and then a clear statement that I should participate in the proceeding only by asking my questions through Mr. Thompson. At that point I complied precisely and spoke to Mr. Thompson directly and asked him to inquire.

THE COURT: Vocally. In a voice that could be heard throughout the courtroom.

MR. NAKELL: I don't know, Your Honor. I--I was at the other end of the counsel table . . . I was sitting at the far end of the counsel table from Mr. Thompson. I looked at Mr. Thompson and spoke to him in a voice that was loud enough that I thought he--he could hear. It may well be that it could be heard by others as well. But my purpose was to comply with the Court's order, to participate in the case only by having questions addressed through Mr. Thompson to the Court. . . . I assure you that

> my only purpose was to assist the Court. I did not intend at any time to be disruptive or even disrespectful or discourteous at any time or to--nor did I have any purpose of encouraging misconduct by Mr. Hatcher or anybody in the audience or anybody else. My purpose was simply to try to bring Mr. Hatcher's position to the attention of the Court in an appropriate manner and obtain a ruling with which we would all comply.

After hearing argument from Nakell's counsel, the Court made a statement, including the following:

> I'm not concerned with respect to this proceeding with the several times that I told Mr. Nakell to sit down and be quiet before we had several long exchanges and he did get to say what he wanted to say, not that I wanted to hear it, but he said it. I'm not concerned with that except as a--as it bears on what happened later.
>
> . . .
>
> What bothers me and why I had Mr. Nakell removed was with all of that predicate, he then turned, in what I saw and

perceived to be a most disrespectful manner, to Mr. Thompson after being directly ordered to sit down and be quiet and not address the Court, but to communicate only through Mr. Thompson, he refuses to do that, remains standing and in a loud voice directs again his same inquiry to the Court but by looking at Mr. Thompson and saying, Mr. Thompson, will you ask.

The respondent, Mr. Nakell, may not have intended or expected the audience reaction, may or may not have, I can't say. But the audience reaction from the supporters of Mr. Hatcher speak more eloquently than anything else the way in which Mr. Nakell had conducted himself at that point toward the Court." (Emphasis added.)

Judge Lake noted that he was "aware of the capabilities of Mr. Nakell; his intelligence and was impressed with his presentation today, his demeanor today . . . . " He made findings of fact and conclusions of law. He found

> as a fact in the Court's close and direct observation of the entire sequence of these events, including the tone of voice of Mr. Nakell, the

> expression on his face, and the volume of his voice in directing his inquiry --his further inquiry to the Court while looking at Mr. Thompson was the direct cause of the disturbance and applause from the audience and was the direct cause of Mr. Hatcher's behavior in exceeding his previous attacks on the Court by his language and launching into a violent attack upon the Court. . . . The Court further finds as a fact that the conduct of the defendant was willfully contemptuous, was deliberate and calculated and designed to disrupt the proceedings of the Court.

Judge Lake found Nakell guilty of criminal contempt of court. He sentenced Nakell to confinement for ten days and a fine of $500. When Nakell's counsel gave notice of appeal, Judge Lake agreed to allow Nakell to remain free without

bond.[9]

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[9] Before these proceedings, newspapers had reported that Judge Lake intended to run for a seat on the North Carolina Supreme Court in the forthcoming election. Less than two months after these proceedings, Judge Lake did file as a candidate for a seat on the North Carolina Supreme Court. During the campaign, Judge Lake ran the following radio advertisement for his candidacy:

> Announcer: Remember Eddie Hatcher?
> Eddie is the criminal who rushed into the newspaper office in Lumberton and held 22 people for over 10 hours, terrorizing them the whole time with a sawed-off shotgun.
>
> He walked away from a federal judge laughing, but in the courtroom of Judge I. Beverly Lake he was handcuffed and gagged for disruptive behavior. Later, he meekly pled guilty and is now serving 18 years in prison.
>
> Isn't this the kind of justice you want in North Carolina? November 6 vote Judge I. Beverly Lake for Supreme Court.
> New voice (Judge Lake?): Paid for by Lake for Supreme Court

(6) Subsequent Proceedings

On December 15, 1989, Nakell filed a Petition For Writ of Certiorari in the North Carolina Supreme Court seeking to remedy the order of Judge Farmer wrongfully removing Nakell, Kunstler and Kuby from Hatcher's defense team, after unsuccessfully seeking the same relief in the State Court of Appeals. On January 18, 1990, the North Carolina Supreme Court granted the petition and issued an order vacating the order of Judge Farmer,

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Committee.

The Raleigh News and Observer, on Tuesday, October 23, 1990 reported: "In February, three months after the handcuffing episode, Mr. Hatcher pleaded guilty and was sentenced by a different judge. But Judge Lake, who is challenging Democratic Justice John Webb, said in an interview that he thought Mr. Hatcher had pleaded guilty 'because he was guilty and because of what I did.'"

as well as the order of Judge Brooks. The order specified that it was "without prejudice to defendant's right to file further motions for pro hac vice appearances of counsel which meet the requirements of NCGS Section 84-4.1. Any such motions shall be determined in the trial court's discretion." State v. Hatcher, 326 N.C. 52, 389 S.E.2d 100 (1990).

Later, without any objection, Nakell together with Thompson appeared with Hatcher when he entered a guilty plea they had negotiated and Nakell spoke on Hatcher's behalf.

(7) The Opinion of the Court of Appeals

The Court of Appeals held that Judge Lake was not required to recuse himself because "Nakell made no personal attacks

on Judge Lake. He addressed only legal issues at Hatcher's hearing, albeit in violation of direct court orders not to do so. . . . Nakell's claim that Judge Lake became embroiled with Hatcher are irrelevant." The Court of Appeals ruled that Judge Lake's interview with a news reporter and his requests for affidavits, although "'not a wise judicial activity," did "not indicate the type of personal bias that would require Judge Lake to recuse himself nor did it render the contempt proceeding unfair." The Court of Appeals held that "Judge Lake did not deny Nakell due process by delaying the summary contempt proceeding for two days" because "Judge Lake could have held this summary proceeding on the day when the contemptuous acts occurred. . . .

Instead, Nakell had time to prepare his case." Finally, the Court of Appeals found that the evidence was sufficient to support the contempt conviction solely on the ground that Nakell "deliberately disobeyed Judge Lake's repeated orders to sit down and be quiet. . . . While it is unlikely that Nakell intended any insult or injury to the court, he nonetheless consciously disobeyed direct orders in circumstances that were made additionally contentious because of Hatcher's violent behavior."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN MAYBERRY V. PENNSYLVANIA AND TAYLOR V. HAYES THAT PETITIONER WAS NOT ENTITLED TO A DIFFERENT JUDGE EVEN THOUGH

(1) THE COURT HAD DELAYED THE CONTEMPT HEARING FOR TWO DAYS;

(2) THE JUDGE HAD BECOME "PERSONALLY EMBROILED" WITH PETITIONER AND HIS CLIENT;

(3) THE JUDGE OUTSIDE OF COURT HAD REQUESTED WITNESSES TO PROVIDE AFFIDAVITS AND HAD READ THEM; AND

(4) THE JUDGE HAD MADE A STATEMENT TO THE PRESS BEFORE THE CONTEMPT HEARING THAT INDICATED A PRIOR JUDGMENT ON PETITIONER'S GUILT.

Judge Lake should have scheduled the hearing before a different judge. Nakell's counsel requested that procedure on three separate grounds but Judge Lake denied all of those requests. Judge Lake's determination to assure that the matter not go before any other judge was apparent on November 14. When Nakell advised him on that afternoon that he had plans to be out of the State two days later, Judge Lake insisted that Nakell nevertheless return at that time. The only reason Judge Lake gave was that he

was assigned to Robeson County only that week.[10]

(1) Judge Lake was endeavoring to deny Nakell his right to represent Hatcher. He thereby "became embroiled in a running controversy with petitioner." Taylor v. Hayes, 418 U.S. 488, 501 (1974).

Moreover, Judge Lake became "personally embroiled" with Hatcher, and he held Nakell responsible for Hatcher's misconduct. Hatcher's outbursts involved highly personal charges directed at Judge

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[10] See Lawton v. Tarr, 327 F.Supp. 670, 673-674 (E.D. N.C. 1971): "It is not enough to be indifferent on the bench. There must also be an appearance of indifference and impartiality with respect to the particular case for decision. A judge should no more reach out for a case than a lawyer should be allowed to shop for a forum."

Lake. E.g., "You're a racist, segregated, son-of-a-bitch you." When Judge Lake threatened to have Hatcher tied and gagged, Hatcher responded: "Like your father would?" Judge Lake answered: "Yes, sir, I think so. Yes, sir." And, of course, Hatcher at the end cursed Judge Lake and threw the pen at him.

Judge Lake held Nakell responsible for Hatcher's misconduct. On November 14, in his specification of the alleged contempt, Judge Lake told Nakell "that you were encouraging the defendant, Eddie Hatcher, to be disruptive of the Court." After that proceeding but before the contempt hearing, Judge Lake told a newspaper reporter in an interview that Nakell had been "encouraging Mr. Hatcher

to be disruptive." In his specifications again at the outset of the hearing on November 16, Judge Lake charged Nakell with "encouraging the Defendant, Eddie Hatcher, to be disruptive of the court."

Under those circumstances, due process required that the trial be conducted before a different judge. Taylor v. Hayes, 418 U.S. 488, 502 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); In re Murchison, 349 U.S. 133, 137 (1955); Offutt v. United States, 348 U.S. 11, 17 (1954); United States v. Meyer, 462 F.2d 827, 836-842 (D.C. Cir. 1972); United States v. Pina, 844 F.2d 1, 13-16 (1st Cir. 1988). This Court, in its unanimous decision in Mayberry, held that, when a judge is subject to personal attacks

throughout a proceeding, a different judge should preside over the contempt hearing if it is held after the conclusion of the proceeding. "(B)y reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor. . . .In the present case that requirement can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law sits in judgment on the conduct of petitioner as shown by the record." 400 U.S. at 466. Where the court does not act until the end of the proceeding and "the marks of

the unseemly conduct have left personal stings" the court should "ask a fellow judge to take his place." 400 U.S. at 464.

The Court further explained in Taylor v. Hayes, 418 U.S. at 501:

> In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less.

See also, Mayberry v. Pennsylvania, 400 U.S. at 465 ("No one so cruelly slandered is likely to maintain that calm

detachment necessary for fair adjudication"); Tumey v. Ohio, 273 U.S. 510, 532 (1927); United States v. Meyer, 462 F.2d 827, 839 (D.C. Cir. 1972).

(2) After the proceeding on November 14, Judge Lake granted an interview about the case with a newspaper reporter, in violation of Canon 3(A)(6) of the Code of Judicial Conduct ("A judge should abstain from public comment about a pending or impending proceeding in any court . . . "). The interview was reported in the newspaper on the morning of the hearing on November 16 and quoted Judge Lake saying that Nakell had been "disruptive of the proceedings . . . and encouraging Mr. Hatcher to be disruptive." There is clear betrayal of bias and certainly per se appearance of

bias when a trial judge tells the press on the eve of trial that the accused is guilty. See Liteky v. United States, 114 S.Ct. 1147, 1157 (1994) (Judicial remarks even during the course of trial--let alone to the press--support a bias challenge "if they reveal such a high degree of . . . antagonism as to make fair judgment impossible"); id. at 1162 (concurring opinion) ("Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality."); McClendon v. Clinard, 38 N.C.App. 353, 247 S.E.2d 783 (1978) (holding that a trial judge in a civil case who gave an interview to a reporter about an incident involving the plaintiffs' attorney was required to grant a motion for his disqualification).

Neither the public nor any defendant could have any confidence in the impartiality of a tribunal sitting in judgment on a defendant if the tribunal itself has already convicted the defendant in the press. It is part of the judicial responsibility for a judge to recite charges in open court. It is another matter for a judge on the eve of a criminal trial in which he is the fact finder, to provide the media an account of the facts as he assumes them to be. When the evidence at the later hearing refutes his assumptions (e.g., "encouraging Mr. Hatcher"), the judge may not have the impartiality to withdraw from them. Cf., Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807, 810 (1987)(noting that the standards of

neutrality for judicial officers are stringent).

(3) Judge Lake spent the time between the proceedings not only talking to the press but also approaching witnesses and asking them for affidavits. Cf. Lowder v. All Star Mills, Inc., 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981) (affidavit cannot support a finding of contempt). Thus, Judge Lake became not only "the charger, the prosecutor,[11] the judge and the press person," as the District Court described him at oral argument, but also the investigator. That

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[11] Judge Lake made his adversarial posture clear when Nakell's counsel, seeking a continuance, advised Judge Lake that he had not had an opportunity to interview witnesses other than those from whom Judge Lake had solicited affidavits, and Judge Lake responded: "Nor have I."

is more than even the contempt power can tolerate.

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

In re Murchison, 349 U.S. at 137.

Nakell acted ccurteously and respectfully to a trial judge determined not to hear him, despite his right to be heard, and his conduct signified no more than a professional zeal in representing his client on questions of the most serious import to the client's defense against grave criminal charges. Even in

a case where guilt is clear, this Court has been vigilant to protect the right of the accused contemnor to a hearing before a judge whose impartiality could not reasonably be questioned. Offutt v. United States, 348 U.S. 11, 16 (1954). In a case such as this in which a different judge might very well have come to a very different conclusion, in which the case involved a difficult and controversial defendant, in which the judge in the face of compelling evidence to the contrary held an attorney responsible for the misconduct of his client, in which the judge relied for his findings on a vague and nonspecific reference to the attorney's "facial gestures" that no other witness saw, and particularly in which the judge reached

out to keep the case before him personally at a time when he was embarking on a political race for higher judicial office and when he later campaigned on the basis of his severe conduct of the proceeding in question, it is even more imperative that this Court protect the right of the accused contemnor to a hearing before a judge whose impartiality may not reasonably be questioned.

II.

THE DECISION OF THE COURT OF APPEALS THAT A CONTEMPT HEARING MAY BE SUMMARY RATHER THAN PLENARY EVEN THOUGH IT IS HELD TWO DAYS AFTER THE CONCLUSION OF THE PROCEEDING IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The exercise of the extraordinary power of summary contempt is justified only in cases of necessity, "where

immediate punishment is essential to prevent 'demoralization of the court's authority . . . before the public,'" In re Oliver, 333 U.S. 257, 275 (1945), and where time is of the essence so there is "a compelling reason for an immediate remedy." United States v. Wilson, 421 U.S. 309, 318, 319 (1975); see also, In re McConnell, 370 U.S. 230, 234 (1962) ("(B)efore the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice"); Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 801 (1987)("While a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the

principle that 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases.'"); Harris v. United States, 382 U.S. 162, 164-165 (1965); cf., United States v. Wilson, 421 U.S. 309, 318 (1975). This is a matter of due process of law. Taylor v. Hayes, 418 U.S. 488, 497 (1974); McConnell, supra; Oliver, supra.

No necessity justified a summary contempt procedure in this case. "(S)witness was not a prerequisite of justice here. Delay necessary for a hearing would not imperil" the court. Harris v. United States, 382 U.S. 162, 164 (1965). "The usual justification of necessity, see Offutt v. United States, 348 U.S. 11, 14 (1954), is not nearly so

cogent when final adjudication and sentence are postponed until after trial." Taylor v. Hayes, 418 U.S. 488, 497 (1974). Judge Lake did not believe on November 14 that summary measures were "necessary to restore order or maintain the dignity and authority of the court," N.C. G.S. section 5A-14, as he postponed any action until the conclusion of the proceeding. Even then, he scheduled the hearing for two days later at a time when the only business before the Court was the contempt hearing. Even at the conclusion of that hearing, Judge Lake found no need for immediate punishment, as he readily released Nakell pending appeal. There was no reason why Judge Lake could not have afforded Nakell a plenary hearing except the only one he

gave: that he wanted to hold the hearing that day so that he could be the presiding judge. It was appropriate for Judge Lake to delay the contempt proceedings on November 14, but the delayed hearing could not as a matter of constitutional due process be the summary proceeding that occurred. A plenary hearing was required.

III.

THE DECISION OF THE COURT OF APPEALS THAT PETITIONER'S CONDUCT CONSTITUTED WILLFUL CRIMINAL CONTEMPT RATHER THAN VIGOROUS, POLITE AND PERSISTENT ADVOCACY IS IN CONFLICT WITH THE DECISION OF THIS COURT IN IN RE MCCONNELL AND OF THE NINTH CIRCUIT IN MATTER OF CONTEMPT OF GREENBERG.

(A) There was no evidence that Nakell disrupted the proceedings.

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of

> court so long as the language does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.

In re: McConnell, 370 U.S. 230, 236 (1962). "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest." Ex Parte Hudgings, 249 U.S. 378, 383 (1919). In McConnell, the court had ordered an attorney not to ask certain questions. The attorney had said, "(W)e have a right to ask the questions, and we propose to do so unless some bailiff stops us." 370 U.S. at 235. This Court set aside the attorney's contempt conviction, holding that the evidence did not satisfy the

"obstruction" standard. The decision of the Court of Appeals is in conflict with that decision of this Court.

"The vigorous advocacy we demand of the legal profession," Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2736 (1991), in the defense of a criminal charge constitutes an essential component of both the right to counsel and due process. Holt v. Virginia, 381 U.S. 131, 136 (1965). A criminal defense attorney is entitled to considerable latitude in "vigorously espousing a client's cause." In re Little, 404 U.S. 553, 555 (1972). "It is essential to our system 'that lawyers be able to make honest good-faith efforts to present their client's cases.' In re McConnell, 370 U.S. 230, 236 (1962).'" Matter of Contempt of

Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988). "(Z)ealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process." Matter of Yagman, 796 F.2d 1165, 1182 (9th Cir. 1986).

There was no evidence that Nakell obstructed the judicial proceedings. At the November 14 proceeding Nakell stood up to protect his client's right to counsel. That subject was at the heart of assuring a fair trial in a difficult and controversial case. At first Judge Lake told Nakell he could not be heard only "at this time." At other times he directed Nakell to sit down and not speak at all. Yet at other times he entertained argument from Nakell and responded to his

arguments or engaged in colloquy with him. While Nakell was persistent, his language was always respectful and directed only to legal issues. He was engaging in vigorous advocacy, but nothing he did constituted an actual obstruction of the court proceedings.[12]

(B) There was no evidence that Nakell willfully disrupted the proceedings.

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[12] The Court of Appeals upheld the sufficiency of the evidence because Nakell "deliberately disobeyed Judge Lake's repeated orders to sit down and be quiet." On the contrary, Judge Lake alternated between entertaining Nakell's arguments and ordering him to sit down and be quiet. Accordingly, Judge Lake, in announcing his decision to convict Nakell, explained: "I'm not concerned with respect to this proceeding with the several times that I told Mr. Nakell to sit down and be quiet before we had several long exchanges . . . I'm not concerned with that except as a--as it bears on what happened later."

Willfulness is an essential element of criminal contempt. N.C. G.S. Section 5A-11. Willfulness means "'purposely and deliberately in violation of law.'" In re Hege, 205 N.C. 625, 630, 172 S.E. 345, 347 (1934).

There was no evidence that Nakell intended to obstruct the proceedings purposely and deliberately. Rather, all of the evidence showed that Nakell intended only to advance the proceedings in accordance with the rule of law. Both his position that the initial order permitting pro hac vice admission of out-of-state attorneys should not have been overturned by another Superior Court Judge and his position that he was entitled to enter a limited appearance pursuant to 15A-141(3) were correct.

Although pursuing a meritorious position will not justify willful obstruction of the proceedings, the strength of the merits of Nakell's arguments does support his good faith and his right vigorously to support his client's case. Even the Court of Appeals agreed that "it is unlikely that Nakell intended any insult or injury to the court".

Even if the positions Nakell was advocating were not correct, however, it was reasonable--and certainly was not willful contempt--for Nakell to present them. Nakell was struggling--in a controversial case, with a court improperly endeavoring to silence him and his presentation of his proper legal positions, with a difficult client out of control with angry outbursts at the

court's actions--to assist the Court in restoring the rule of law, and dignity, to the important proceeding.

(C) There was no evidence that Nakell encouraged the outbursts by Hatcher or the audience.

It would certainly be dangerous doctrine to hold an attorney criminally responsible for the misconduct of a client without evidence that the attorney encouraged the misconduct. An attorney who gives a legal argument cannot be held responsible for the risk that his client or another may react emotionally to it or to the Court's response to it. Not surprisingly, there is no precedent for doing so. The unconstitutional chilling effect of such a rule upon advocacy should be clear.

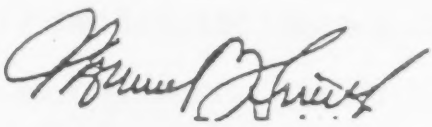
There was no evidence that Nakell aided, abetted, or encouraged either Hatcher in his outbursts or the audience in its applause. There was no evidence that Nakell intended that either Hatcher or the audience do anything disruptive. Indeed, all of the evidence was to the contrary. Thompson and Nakell both testified that before the hearing they secured a commitment from Hatcher that he would refrain from any outbursts, and that Nakell insisted on such a commitment before he agreed to attend the hearing as Hatcher requested. That testimony, which was undisputed and unchallenged, is impossible to reconcile with an intention to encourage Hatcher to be disruptive. Moreover, Hatcher remained quiet as long as Nakell could argue for him, and acted

disruptively only when Nakell was silenced.

CONCLUSION

For the foregoing reasons, Petitioner Barry Nakell respectfully requests that the Court grant this petition for certiorari.

Respectfully submitted,



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APPENDIX A

ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 92-89-HC-H

BARRY NAKELL, Petitioner,	)	
v.	)	ORDER FILED FEB. 26 '92
LACY H. THORNBURG, Attorney General of North Carolina, Respondent.	)	

This matter is before the court on the Petitioner's Motion for a Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254. The motion was filed in this court on February 3, 1992, contemporaneously with the filing of a Motion to Stay the Judgment of the courts of North Carolina, ordering the Petitioner's incarceration.

A hearing was held by this court on

February 7, 1992, and the matter is ripe for disposition.

STATEMENT OF THE CASE

On December 6, 1988, Eddie Hatcher ("Hatcher") was indicted in the Superior Court of Robeson County on 14 counts of kidnapping. Between December 7, 1988, and November 7, 1989, there were multiple court orders entered in Hatcher's case by four different judges which appointed counsel; transferred representation; admitted counsel from other jurisdictions; and overruled previous orders appointing counsel, all in an apparent attempt to provide competent counsel for Hatcher.

On November 14, 1989, a pretrial hearing was held before North Carolina Superior Court Judge I. Beverly Lake,

Jr., in Robeson County, North Carolina, to consider Hatcher's motions to represent himself, and for reconsideration of an order removing a previous counsel. Hatcher was represented at the hearing by the Robeson County Public Defender Angus Thompson. After the hearing began, Barry Nakell, Esquire, entered the courtroom, filed a Notice of Limited Appearance with the clerk pursuant to N.C.G.S. section 15A-141(3), and took a seat at the defense counsel table. While Judge Lake was stating the predicate of the hearing, Mr. Nakell interrupted and requested to be heard. The court refused to hear Mr. Nakell at that time and continued to state the predicate of the hearing.

After Judge Lake stated the

predicate, Mr. Nakell again interrupted. He requested to be heard on the question of the status of the Notice of Limited Appearance which he had filed. Judge Lake informed him that the notice was "not in compliance... the order of September 6th entered by Judge Farmer." (TR. State of N.C. v. Eddie Hatcher, November 14, 1989, at 7). Mr Nakell expressed his concern with Judge Farmer's previous order whereupon Judge Lake stated that he was not going to hear Mr. Nakell and requested that he sit down. Mr. Nakell continued to argue and refused to sit down after three direct orders from Judge Lake.

While Judge Lake was directing Mr. Nakell to sit down, Hatcher interrupted, addressed the court with slanderous

remarks, and attempted to question Judge Lake about an alleged ex parte communication Judge Lake previously had with the District Attorney. After several attempts to quell Hatcher, Judge Lake stated that if he continued to "insist on interrupting the court, I'll sit you down in that chair and I'll have you tied and gagged." Id. at 11. Discussion between Mr. Thompson and Judge Lake continued about Judge Farmer's order in an attempt to ascertain the status of possible co-counsel and Mr. Nakell's role in the defense. Mr. Nakell again interrupted Judge Lake and the following exchange occurred:

> THE COURT: Judge Farmer, Mr. Nakell -- and, again, I'm going to direct you not to interrupt me now. If you want to --
>
> MR. NAKELL: I'm sorry. I

thought you had finished, your Honor.

THE COURT: If you want to pose a question to the court, you do so through Mr. Thompson.

MR. NAKELL: Your Honor, I'm -- I'm a little bit in limbo in this because Judge Farmer did not address the question of my participation.

THE COURT: Well, I am doing so.

MR. NAKELL: I don't understand any basis --

THE COURT: I am doing so now. The court does not recognize your representation of this defendant.

MR. NAKELL: May I inquire, your Honor, about the basis for that so that I can understand -

THE COURT: Judge Framer's order.

MR. NAKELL: -- what I need to do?

THE COURT: Judge Farmer's order.

THE DEFENDANT: You said his order was only in effect while he was here. He's gone. That's what you said.

THE COURT: Judge Farmer's order.

MR. NAKELL: Judge Farmer, Your Honor, in open court in the hearing on September the 5th did, in fact, say something about not being able to appear; but none of his written orders

addressed my participation in the case at all, and I don't understand any basis for precluding me--

THE COURT: Well, let me see if I can make you understand, Mr. Nakell. I am denying your request for a limited appearance on behalf of this defendant and I'm directing you to sit down and be quiet and not say another word to the Court except if you want to say something, do it through Mr. Thompson.

MR. NAKELL: All right. Mr. Thompson, would you inquire about the basis -- legal basis for a licensed North Carolina attorney from appearing on behalf of a defendant in a criminal case in association with a public defender --

THE COURT: Mr. Nakell.

MR. NAKELL: -- to assist on --

THE DEFENDANT: . . . .

MR. NAKELL: Make that inquiry please, Mr. Thompson.

THE COURT: All right. Mr. Bailiff, remove this man from the courtroom and hold him for further action by the court.

Id. at 16-18.

The record reflects that Mr. Nakell

was escorted from the courtroom. Hatcher then threw a pen in the direction of the bench and verbally assaulted Judge Lake with foul language. Judge Lake directed the Sheriff to take Hatcher into custody and have him bound and gagged.

The pre-trial hearing of Hatcher's case was concluded, and Judge Lake had Mr. Nakell returned to the courtroom. Judge Lake then informed Nakell of the charge of direct criminal contempt of court. Mr. Nakell requested a specification of the contempt charge, and Judge Lake stated that the grounds for the charge were Mr. Nakell's (1) refusal to sit down after the court gave a direct order to do so; (2) refusal to be quiet after being given a direct order to do so; (3) interruption of the presiding

judge by continuing to speak over the voice of the court; (4) disruption of court proceedings; (5) unduly prolonging the court proceedings; and (6) pandering to the courtroom audience and encouraging the Defendant to be disruptive of the court. After notifying Nakell of the charges and the basis thereof, Judge Lake scheduled the matter for hearing on Thursday, November 16, 1989, at 2:30 p.m.

On November 16, 1989, Judge Lake convened the court for the continuation of the criminal contempt hearing. Petitioner Nakell was present and represented by Mr. H. Gerald Beaver. The court stated that the reason for the delay in the proceeding was to afford Mr. Nakell "adequate opportunity to respond to the direct criminal contempt charge."

(TR. In The Matter of Attorney Barry Nakell, November 16, 1989, at 3). The court presented Mr. Nakell with court requested affidavits of various attorneys who were present at the November 14th hearing. Mr. Beaver accepted the affidavits and transcript proceeding, inquired whether the hearing would proceed as a summary or plenary contempt matter, informed the court of his concern with the judge's involvement in the case, and requested that the matter be made returnable before another judge. The court denied counsel's request to have the matter returned before another judge and informed counsel that the proceeding was "a continuation of what the court has considered a matter of direct criminal contempt which occurred during the middle

of the motions hearing in the State v. Hatcher matter." Id. at 9. Furthermore, the court stated that "[t]he matter could have been summarily adjudicated and determined by the court at that time." Id. at 9. Thereafter, the court continued to proceed in a summary fashion.

Upon the conclusion of the hearing, Judge Lake recited the findings of fact and conclusions of law. The court concluded that the conduct of Mr. Nakell constituted:

> (1) ...[W]illful behavior committed during the sitting of a court and directly tended to interrupt its proceedings. ...
>
> (2) ...[W]illful behavior committed during the sitting of a court in its immediate view and presence and directly tended to impair the respect due the authority of the court.

> (3) ... [W]illful disobedience of and resistance to or interference with a court's lawful directive and order.

Id. at 101.

Thereafter, the court found Mr. Nakell guilty of direct criminal contempt in violation of N.C.G.S. section 5A-11(a) and imposed a fine of $500 and imprisonment for ten days in the custody of the Sheriff of Robeson County.

Mr. Nakell subsequently appealed his conviction to the North Carolina Court of Appeals and the North Carolina Supreme Court. The North Carolina Court of Appeals affirmed Mr. Nakell's conviction by opinion dated December 17, 1991, and the North Carolina Supreme Court dismissed his petition for discretionary review on January 30, 1992.

Petitioner was incarcerated in the Robeson County jail on February 3, 1992, and, on the same day, caused to be filed in this court a Motion for a Writ of Habeas Corpus pursuant to 18 U.S.C. section 2254, and a Motion to Stay the Judgment of the courts of North Carolina ordering the Petitioner to be incarcerated.

This court, by order dated February 4, 1992, at 4:45 p.m., granted the stay, ordered the immediate release of the Petitioner, and scheduled a hearing for February 7, 1992, in New Bern, North Carolina. Petitioner was present with counsel, Norman Smith, Esquire, and the Attorney General of North Carolina was represented by Assistant Attorney General Clarence J. Delforge, III.

DISCUSSION

This court notes that the Petition for Writ of Habeas Corpus enumerates eight separate grounds for relief. At the hearing on the petition, counsel for Mr. Nakell concurred with this court that the grounds could be consolidated into the following two basic contentions: (1) that there was insufficient evidence to convict the Petitioner for criminal contempt, and (2) that the Petitioner's constitutional rights were violated by the manner in which the hearing was held, the fact that the presiding judge was biased, and the fact that the judge refused to recuse himself.

I. SUFFICIENCY OF THE EVIDENCE

Petitioner contends that there was insufficient evidence to support a

finding beyond a reasonable doubt that he committed direct criminal contempt of court. Specifically, Petitioner objects to the court's findings of fact and claims that the evidence fails to support the conclusions of law made by Judge Lake at the November 16, 1989, proceeding.

When a Petitioner is challenging his state court conviction by means of a Petition for Writ of Habeas Corpus filed in federal district court alleging insufficiency of the evidence, the district court must determine if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct.

2781, 2789 (1979) (emphasis in original).

In the State of North Carolina, direct criminal contempt is a crime punishable by censure, imprisonment for up to 30 days, a fine not to exceed five hundred dollars, or any combination of the three. N.C.G.S. section 5A-12. North Carolina General Statute Section 5A-11 enumerates, describes, and defines the activity which constitutes criminal contempt. The applicable portion of the statute to the case at bar provides that criminal contempt is:

> 1. Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
> 2. Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
> 3. Willful disobedience of,

> and resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C.G.S. section 5A-11.

The line between strenuous advocacy of a client's cause and criminal contempt is often fine and hard to distinguish. However, Mr. Nakell was not counsel of record for Eddie Hatcher and appeared at the hearing for the purpose of filing a Notice of Limited Appearance. The record reflects that Mr. Nakell failed to adhere to the court's multiple requests and direct orders to "sit down" and "be quiet." The court repeatedly requested Mr. Nakell to speak through Mr. Thompson but Mr. Nakell was very persistent in addressing the court himself. Instead of quietly asking Mr. Thompson to pose his

question to the court, Mr. Nakell audibly addressed Mr. Thompson, which action this court views as deliberate disrespect. Additionally, Judge Lake's findings of fact and the record show that Mr. Nakell's contemptuous actions before the court were the direct cause of applause from the audience, obscenities from Hatcher, and Hatcher's actions of throwing a pen in the direction of the bench.

The record further reflects that Mr. Nakell failed to heed warnings that he may be held in direct criminal contempt of court; that he failed to obey direct orders of the court; and that a rational trier of fact could have found proof beyond a reasonable doubt that the cumulative impact of Mr. Nakell's actions

constituted direct criminal contempt of court.

This court concludes there was sufficient evidence to support a finding of direct criminal contempt.

II. VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS (DUE PROCESS)

Petitioner next contends that his constitutional due process rights were violated by the manner in which the contempt hearing was held and the failure of Judge Lake to recuse himself from the criminal contempt hearing and judicial bias. Petitioner claims that once Judge Lake failed to conduct the direct criminal contempt proceeding summarily, i.e. substantially contemporaneously with the contempt pursuant to N.C.G.S. section 5A-14, he was under a duty, because his

objectivity was reasonably questioned, to have the matter returned before a different judge pursuant to N.C.G.S. section 5A-15.

The power of a court to punish a contempt of court is thought to be an inherent and integral element of its power. In Ex parte Robinson, 86 U.S. 505, 22 L.Ed. 205 (1873) the United states Supreme Court stated:

> The power to punish for contempt is inherent in all courts; its exercise is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgements, orders and writs of the courts and consequently, to the due administration of justice.

See also, Michaelson v. United States, 266 U.S. 42, 45 S. Ct. 18 (1924); Young v. United States, 481 U.S. 787, 107 S.

Ct. 2124 (1987); Zambrano v. City of Tustin, 885 F.2d 1473, (9th Cir. 1989).

Notice and hearing are provided by statute for certain types of contempt whereas petty contempt, like other petty criminal offenses, may be punished summarily. Fisher v. Pace, 336 U.S. 155, 69 S. Ct. 425 (1949). "[C]ontempt of court is a petty offense when the penalty imposed does not exceed six months or a longer penalty has not been expressly authorized by statute." Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697 (1974).

This court recognizes that Judge Lake had two options; hear the criminal contempt charge immediately or give the petitioner notice and time to calm down, obtain counsel, and appear at a later date. Judge Lake chose the latter and

continued the matter for 48 hours. This court views this procedure as discretionary, and concludes the Petitioner was in no way deprived of any constitutional rights.

Now addressing the issue of judicial bias and the trial judge's refusal to recuse himself, this court notes that in a direct criminal contempt proceeding, the judge assumes the roles of prosecutor, judge, and jury. Therefore, it is important that the court be cognizant of its duty to hold a fair and impartial hearing. In certain situations, this may require that the charging judge recuse himself. In Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697 (1974), the United States Supreme Court stated that "contemptuous conduct, though

short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot 'hold the balance nice, clear and true between the state and the accused ... .'" (quoting Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437 (1927). Should this be the case, due process mandates that a trial judge disqualify himself from the proceeding. When determining whether a trial judge was sufficiently "embroiled" in the controversy as to require recusal, the question is not only whether there was an actual bias on the judge's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and of the accused." Taylor v.

Hayes, 418 U.S at 501, 94 S. Ct. at 2704 (quoting Ungar v. Sarafite, 376 U.S. 575, 588, 84 S. Ct. 841 (1964)).

In the case at bar, Petitioner claims that the Judge became "personally embroiled" with Hatcher, and held Mr. Nakell, rather than Hatcher, responsible for the misconduct; that the Judge, outside of court, improperly requested witnesses to the initial proceeding to provide affidavits for the contempt hearing; and that Judge Lake improperly gave an interview to a reporter. Petitioner contends that these acts show that Judge Lake's objectivity was reasonably questioned and that he should have recused himself and ordered the matter returned before a different judge.

This court is well aware of the

importance of providing a proper unbiased forum for the prosecution of any criminal matter, but likewise this court "cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority." Ungar v. Sarafite, 376 U.S. 575, 584, 84 S. Ct. 841, 847 (1964). After Judge Lake's multiple directives to Mr. Nakell to address the court through Mr. Thompson and Mr. Nakell's repeated disregard of these directives, the court concludes that Judge Lake was very tolerable of Mr,. Nakell's persistence and maintained proper judicial decorum.

Judge Lake's request for affidavits from others in attendance and communication with the media does not convince this court of any prejudice

towards the Petitioner and did not unduly infringe on his due process rights. The request for affidavits was a contemporaneous request by the trial judge of those officers of the court in attendance to further preserve the record. Copies of the affidavits were given to the Petitioner and his counsel at the later hearing. Judge Lake's response to the media, although in hindsight was not a wise judicial activity, did not reveal any prejudice or display any bias. It was merely a rough recitation of the direct criminal contempt charges stated in open court on November 14, 1989.

This court finds that Judge Lake conducted the Petitioner's direct criminal contempt proceeding well within

the general parameters of the Due Process Clause of the Fourteenth Amendment. The Petitioner was afforded notice of the charges, an opportunity to be heard, and an opportunity to obtain counsel. The court utilized the direct criminal contempt proceeding to preserve order and the appropriate respect for the tribunal in an ongoing proceeding. The contemptuous conduct occurred in the actual presence of Judge Lake and it was within his authority to dispense of the matter summarily.

This court is convinced that justice and fairness did prevail throughout these proceedings and the petitioner was afforded every due process right.

CONCLUSION

This court, having carefully reviewed all pleadings in this matter including the transcript of the proceedings and the memoranda and briefs submitted by all parties in interest, is convinced that fairness and due process was afforded the Petitioner and is further convinced that the ultimate judgment of the court of 10 days incarceration and a $500 fine was fair and warranted by the improper conduct of the Petitioner.

Therefore and accordingly, the Petition for Writ of Habeas Corpus is hereby DENIED. The Respondents's Motion to Dismiss Lacy H. Thornburg, Attorney General of North Carolina, as Respondent is not addressed due to the findings

relating to the contempt issue.

It is further ORDERED that the stay of the judgment of the State of North Carolina ordered by this court on February 4, 1992, shall expire at 9:00 a.m. on the 10th day following the filing of this order.

This 25th day of February, 1992.

(signed)

_____

MALCOLM J. HOWARD
United States
District Judge
At Greenville, N.C.
#20

APPENDIX B

OPINION OF THE COURT OF APPEALS

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BARRY NAKELL.
Petitioner-Appellant,

v.

ATTORNEY GENERAL
OF NORTH CAROLINA, No. 92-6226
Respondent-Appellee.

NORTH CAROLINA ACADEMY
OF TRIAL LAWYERS;
NORTH CAROLINA
CIVIL LIBERTIES UNION
LEGAL FOUNDATION,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CA-92-89-HC-H)

Argued: September 29, 1993

Decided: January 27, 1994

Before ERVIN, Chief Judge, and MURNAGHAN and WILKINS,
Circuit Judges.

Affirmed by published opinion. Chief Judge Ervin wrote the majority opinion, in which Judge Wilkins joined. Judge Murnaghan wrote a dissenting opinion.

COUNSEL

ARGUED: Norman Barrett Smith, SMITH, FOLLIN & JAMES, Greensboro, North Carolina, for Appellant, Clarence Jo DelForge, III, Assistant General, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, Raleigh, North Carolina, for Appellees. Robert P. Mosteleer, DUKE LAW SCHOOL, Durham, North Carolina, for Amici Curiae.

OPINION

ERVIN, Chief Judge:

Barry Nakell was convicted of criminal contempt in the Superior Court

of Robeson County, North Carolina before Judge I. Beverly Lake, Jr. on November 16, 1989. Nakell has both paid the $500 fine and served the 10 day jail sentence imposed by Judge Lake. After exhausting all available state court remedies, Nakell filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. Nakell appeals from the district court's denial of the petition.

The issues on appeal are (1) whether Nakell's unconditional release from custody renders his appeal moot, (2) whether the evidence was sufficient to support Nakell's conviction, and (3) whether Judge Lake's summary contempt proceeding violated Nakell's due process

rights.

We find that because Nakell may suffer collateral legal consequences resulting from his conviction, his appeal is not moot. The evidence, however, was sufficient to support Nakell's conviction and his due process rights were not violated by Judge Lake's proceeding. The district court's denial of Nakell's petition for a writ of habeas corpus is affirmed.

I.

Barry Nakell, a North Carolina attorney, was convicted in state court on direct criminal contempt charges and sentenced to ten days imprisonment and a $500 fine. The charges arose from a contentious pre-trial hearing concerning the legal representation of Eddie

Hatcher, a controversial defendant whose kidnapping case had engendered substantial publicity.

At Hatcher's first courtroom appearance, he was represented by Nakell on limited appearance and by Ronald Kuby, a New York attorney appearing *pro hac vice*. Kuby and William Kunstler, another New York attorney, were later admitted *pro hac vice* to represent Hatcher in association with a court-appointed attorney. Subsequent orders concerning Hatcher's representation were made at later hearings which in effect provided that only court-appointed counsel would be recognized on Hatcher's behalf.

On November 14, 1989, Judge Lake began the hearing in question by

reviewing three of these orders.* One order appointed the public defender to represent Hatcher. A second order denied eligibility of Kunstler and Kuby to appear *pro hac vice*. A third order prevented Hatcher from dismissing the public defender until the court received a writing from Hatcher stating that he wanted to proceed *pro se*. The orders created ambiguity concerning the status of Nakell. Judge Lake clearly considered the previous order recognizing only the public defender as counsel for Hatcher to be controlling.

As Judge Lake was preparing to consider the issue of Hatcher's *pro se*

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* It should be noted that all of these orders were entered by superior court judges other than Judge Lake.

representation, Nakell asked to be heard by the court. Judge Lake denied Nakell's request. Nakell interrupted the court again to try to clarify the issue of Hatcher's representation. Judge Lake informed Nakell that his notice of limited appearance was not in conformity with the order recognizing the public defender, Angus Thompson, as the only attorney of record in the case. Judge Lake told Nakell that he would not be heard. Nakell continued to present his views and Hatcher also interrupted with obscene outbursts. The judge instructed Nakell to sit down and warned either Nakell or Hatcher (it is unclear whom the judge was addressing) that he would be removed from the courtroom if he continued to interrupt. Nakell continued

to state his argument and the judge said "I said sit down, Mr. Nakell. That's a direct order from the court." Nakell continued to address the court and Judge Lake said "Do you want to be held in direct criminal contempt of this court?" After several further interruptions by Nakell and Hatcher, the judge told Nakell that "I am directing you specifically to sit down and be quiet." When Nakell further insisted on addressing the question of Hatcher's representation, after several additional admonitions by the judge, the judge finally said to Nakell "Well, let me see if I can make you understand, Mr. Nakell. I am denying your request for a limited appearance on behalf of this defendant and I'm directing you to sit down and be quiet

and not say another word to the court except if you want to say something, do it through Mr. Thompson." Nakell then turned to Mr. Thompson and in the same tone of voice used to address the court, said, "All right. Mr. Thompson, would you inquire about the basis - legal basis for [prohibiting] a licensed North Carolina attorney from appearing on behalf of a defendant in a criminal case in association with a public defender." The audience applauded. Hatcher continued to interrupt with obscene outbursts attacking the judge. At that point, Judge Lake directed the bailiff to remove Nakell from court and Hatcher threw a pen at the judge.

At the end of the hearing, the judge ordered Nakell to return to the courtroom

and specified the contempt charges, including refusing to sit down when ordered to do so, refusing to be quiet, being disruptive of the proceedings, unduly prolonging the proceedings, pandering to the audience and encouraging defendant Hatcher to be disruptive. The judge ordered Nakell to return two days later, with counsel if he desired, for further consideration of the matter. Nakell requested more time but that plea was denied.

Judge Lake later approached several court personnel and asked them to provide affidavits of the preceding events. The judge also responded to a telephone call from a newspaper reporter by stating that Nakell had been disruptive.

At the contempt hearing on November

16, Nakell requested through his attorney that the case be continued so as to be placed before another judge. Judge Lake denied the request. The judge stated that "this is a continuing hearing." He was "continuing to proceed summarily" and he noted "As I said, this is a summary proceeding." The judge provided copies of the affidavits he had procured to Nakell and his counsel. Four witnesses testified at the hearing. Nakell testified that he had not intended to disrupt the proceedings but only to clarify the issue of Hatcher's representation. He did testify, however, that it was clear to him that the court was ruling that he should not appear in the case. Judge Lake found that Nakell willfully interrupted the proceedings of the court

and encouraged Hatcher to be disruptive. Nakell was convicted of direct criminal contempt of court and sentenced to 10 days in jail and a $500 fine.

II.

Nakell's unconditional release from custody after serving his ten day sentence in the Robeson County jail raises the issue of whether this petition for habeas corpus has become moot. Generally, a case becomes moot when the issues presented are no longer "live" or the parties lack a "legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)). Two exceptions to the mootness doctrine include cases where collateral consequences give a

sufficient stake in the outcome and cases where the underlying factual predicate is capable of repetition yet evading review. *Leonard v. Hammond*, 804 F.2d 838, 842 (4th Cir. 1986) (citations omitted).

In *Carafas v. La Vallee*, 391 U.S. 234, 237 (1968) (quoting *Fiswick v. United States*, 329 U.S. 211, 222 (1946)), the Supreme Court held that certain disabilities or burdens which may flow from petitioner's conviction gave him a "'substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed."' Because of these "'collateral consequences,"' the case was not moot. *Carafas*, 391 U.S. at 237-238 (quoting *Ginsberg v. New York*, 390 U.S. 629, 633-34 n.2 (1968)). The disabilities the

Court was considering included being unable to engage in certain businesses, serve as an official of a labor union, vote in any New York State election or serve as a juror. *Carafas*, 391 U.S. at 237.

A possible refund of a fine has also been held a collateral consequence constituting a sufficient stake in the outcome to prevent mootness. In *Richmond Black Police Officers Ass'n v. Richmond*, 548 F.2d 123, 129 (4th Cir. 1977), this court held that "although the fines have been paid, the case is not moot because the district judge levied the fines to be paid immediately subject to refund upon appellate reversal ...." Similarly, in *Port v. Heard*, 764 F.2d 423, 427 (5th Cir. 1985), "the fine, as a direct

consequence of the contempt convictions, preserves the Ports' stake in the merits of the appeal they bring before us, despite their release from custody." Nakell has produced as part of his Reply to Respondent's Supplemental Brief an affidavit from the records maintenance manager of the North Carolina courts stating that it is the customary procedure of North Carolina courts to refund fines upon receiving notice that a conviction has been overturned. Nakell's interest in the return of the $500 fine is a collateral consequence sufficient to prevent mootness.

Nakell further argues that because he is an attorney, he will suffer the collateral consequence of possible disciplinary proceedings as a result of

his contempt conviction. In *Richmond Black Police Officers Ass'n*, the court stated that additional collateral consequences, beyond the possibility of the refund of the fines, also prevented the case from becoming moot. In particular, the court noted that one of the defendants was an attorney who faced "possible disciplinary proceedings" if his conduct was found to violate applicable guidelines. *Richmond Black Police Officers Ass'n*, 548 F.2d at 129. Likewise, in *In re Kave*, 760 F.2d 343, 353 n.20 (1st Cir. 1985), the court found that despite the fact that the district court had set aside the imposition of fines, the appeal was not moot because, in addition to other consequences, the defendant attorney might face

disciplinary charges. Although the North Carolina State Bar has dismissed a grievance against Nakell based on this conviction, Nakell contends that the grievance may be revived. This possibility serves as an additional collateral consequence preventing mootness.

The Attorney General argues that this case is similar to *Broughton v. North Carolina*, 717 F.2d 147 (4th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984), in which a misdemeanor contempt conviction was found to possess no significant collateral consequences and was not capable of repetition yet evading review so that release from custody rendered the appeal moot. In that case, however, no fine was imposed and the

petitioner was a layperson not subject to professional discipline. The case at bar presents circumstances that distinguish it from Broughton. Because of the collateral consequences associated with Nakell's conviction, his appeal is not moot.

Following oral argument in this case, the Attorney General submitted a motion to dismiss the appeal due to lack of jurisdiction, arguing that because the appeal is moot, this court lacks jurisdiction. We have found that Nakell's appeal is not moot and therefore the motion is denied. It bears noting, however, that the question of mootness is separate and distinct from the jurisdictional issue. *Leonard*, 804 F.2d at 842. The federal habeas corpus

statute requires that plaintiffs must be in custody when the application for habeas is fled. *Id.* Once federal jurisdiction is thus established, plaintiffs' subsequent releases have no effect on that jurisdiction. *Id.*

Nakell filed his petition for habeas corpus while released on his own recognizance on the day he later began serving his sentence. The Supreme Court has held that a person released on his own recognizance is "in custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. §§ 2241(c), 2254(a). *Hensley v. Municipal Court*, 411 U.S. 345, 345-46, 351-53 (1973). Because Nakell was in custody when he fled his petition, federal jurisdiction attached and is not affected by his subsequent release.

III.

In a habeas corpus action, the standard of review of the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in the original). This court has held that review "must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982).

To find direct criminal contempt

there must be a contemptuous act committed within the sight or hearing of a presiding Judicial official in or in immediate proximity to the room where proceedings are being held that is likely to interrupt or interfere with matters then before the court. N.C.Gen.Stat. § SA-13 (1986). A contemptuous act includes, among others, willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings; willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority; and wilful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C.Gen.Stat. § 5A-11 (1986).

A rational trier of fact could find that Nakell willfully disobeyed a lawful order of the court within sight of a presiding judge in proximity to the hearing in a manner that was likely to interrupt the matters before the court. Although Nakell contends that he did not intend to disrupt the proceedings, he in fact deliberately disobeyed Judge Lake's repeated orders to sit down and be quiet. All that is required for willful behavior is a "'volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.'" *United States v. Warlick*, 742 F.2d 113, 117 (4th Cir. 1984) (quoting *United States v. Marx*, 553 F.2d 874, 876 (4th Cir. 1977)). While it is unlikely that Nakell intended any

insult or injury to the court, he nonetheless consciously disobeyed direct orders in circumstances that were made additionally contentious because of Hatcher's violent behavior. Given Hatcher's repeated outbursts and violent tendencies, regardless of whether caused by Nakell, Judge Lake may have felt a need to maintain order even more acutely than under more normal circumstances. Judge Lake's admonitions to Nakell were unambiguous and Nakell chose to ignore them.

Nakell makes numerous contentions that his actions were justified because the legal position he was espousing was correct. His conclusion does not follow from his premise. Regardless of whether his arguments were correct, it was

inappropriate for him to present them to the court when he clearly understood that the court did not recognize him as Hatcher's counsel. *Walker v. Birmingham*, 388 U.S. 307 (1967) (holding that invalidity of trial court's order not a defense in contempt proceeding for disobedience of that order); *Howat v. Kansas*, 258 U.S. 181, 189 (1922) (stating that "the error was subject to correction only by the ordinary method of appeal, and disobedience to the order constituted contempt").

Because a rational trier of fact could find the elements of direct criminal contempt beyond a reasonable doubt, Nakell's insufficiency of the evidence claim must fail.

IV.

Nakell's claim that his due process rights were violated in the course of the summary contempt proceeding flows from the alleged personal bias of Judge Lake. Judicial bias should be treated as a mixed question of law and fact subject to *de novo* review. *Sandstrom v. Butterworth*, 738 F.2d 1200, 1207 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). Furthermore, the Supreme Court has "justified independent federal or appellate review as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor."' *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 518 (1984)).

Nakell's due process claim is based on two issues: (1) whether because the contempt hearing was delayed for two days, the proceeding should have been conducted in a plenary rather than summary fashion and (2) whether because Judge Lake allegedly became personally embroiled in the controversy, Nakell was entitled to a hearing by a different judge.

The Supreme Court has held that

> "summary" ... does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality ... that goes with a conventional court trial .... Reasons for permitting straight-way exercise of summary power are not reasons for compelling or encouraging its immediate exercise." *Sacher v. United States*, 343 U.S. 1, 9-10 (1952).

The Court held that delay of summary proceedings was within the discretion of the trial judge when she deemed immediate action inexpedient. *Sacher*, 343 U.S. at 10. Similarly, in *Ungar v. Sarafite*, 376 U.S. 575 (1964), the Court affirmed a contempt proceeding claimed by the petitioner to be summary that was held seven days after the end of the trial in which the contemptuous behavior occurred. The Court found that the requirements of due process were met because the petitioner was afforded notice and an opportunity to be heard. This court has also found delayed summary contempt proceedings to be consistent with due process. See *Paul v. Pleasants*, 551 F.2d 575 (4th Cir. 1977), *cert. denied*, 434 U.S. 908 (1977).

Because Nakell was accused of direct criminal contempt, Judge Lake could have held this summary proceeding on the day when the contemptuous acts occurred. Nakell would have been denied any delay and would not have had the opportunity to obtain counsel. Instead, Nakell had time to prepare his case. Judge Lake did not deny Nakell due process by delaying the summary contempt proceeding for two days.

That Nakell was not afforded more time to prepare does not alter this finding.

> The matter of a continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Ungar*, 376 U.S. at 589.

Nakell appeared at his contempt proceeding represented by counsel, questioned witnesses and personally took the stand. Nakell was afforded notice and an opportunity to be heard.

Nakell further contends that Judge Lake should have recused himself from the contempt proceedings. When contemptuous conduct has personally attacked or provoked a judge so as to embroil her in a personal controversy with the defendant, the judge should excuse herself from the contempt proceedings. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974). However, "there is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In Re Union Leader Corp.*, 292 F.2d 381,

391 (1st Cir. 1961), *cert. denied*, 368 U.S. 927 (1961). Because the acts in question are within the personal knowledge of the judge, that judge should preside whenever possible. "In sum, a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary." *Id.* at 389.

Nakell made no personal attacks on Judge Lake. He addressed only legal issues at Hatcher's hearing, albeit in violation of direct court orders not to do so. The Supreme Court has been "unwilling to bottom a constitutional rule of disqualification solely upon such disobedience to court orders and criticism of its rulings during the course of a trial." *Ungar*,

376 U.S. at 584. Nakell's claim that Judge Lake became embroiled with Hatcher are irrelevant.

Nakell finally claims that Judge Lake's request for affidavits from court personnel and his interview with a news reporter regarding the contempt charges indicate personal bias. As noted by the district court, this type of activity is "not a wise judicial activity" but does not indicate the type of personal bias that would require Judge Lake to recuse himself nor did it render the contempt proceeding unfair.

Because it was not a violation of due process to delay the summary contempt proceeding two days and because Judge Lake did not become personally embroiled with the petitioner, Nakell's due process

claim must fail.

V.

The judgment of the district court is therefore affirmed.

AFFIRMED

MURNAGHAN, Circuit Judge, dissenting:

I write only on the question of whether Nakell was entitled to a contempt hearing before a judge other than Judge Lake.

Supreme Court precedent teaches that another judge should conduct contempt proceedings when (1) the trial judge is personally attacked by the contemnor, or 2) the trial judge becomes embroiled in a controversy with the contemnor. *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-466 (1971). Since I believe that

following either *Taylor* or *Mayberry* Judge Lake should have recused himself from the contempt hearing, I dissent.

The majority relies on the fact that the personal attack upon Judge Lake was launched not by the contemnor (appellant Nakell) but by his client (Hatcher), and thereby suggests that the "personal attack" doctrine does not apply. The majority's reliance on this apparent distinction is misplaced, however, because Judge Lake held Nakell responsible for the attack and repeatedly and explicitly charged Nakell with directly causing and encouraging his client's conduct-- and it is Judge Lake's interpretation of the events and his possible personal bias which are at issue here.

In his specification of the contempt charges, on November 14th, the judge stated: 'It appeared clear to the Court that you were pandering to the audience and to the defendant and that *you were encouraging the defendant, Eddie Hatcher, to be disruptive.*" J.A. 89 (emphasis added). The judge reiterated the point in his interview with a *Raleigh News and Observer* reporter, *see* J.A. 99-100, and again when rendering his findings of fact on November 16th. *See* J.A. 192 (finding by Judge Lake that Nakell's behavior "was the *direct cause* of Mr. Hatcher's behavior in exceeding his previous attacks on the Court by his language and launching into a violent attack upon the Court" (emphasis added)); *id.* at 196 (concluding "from the Court's direct

observation that Mr. Nakell's conduct *incited* that eruption [and] exacerbated that highly volatile situation" (emphasis added)).

Whether Nakell's allegedly contemptuous conduct in fact caused Hatcher to launch a personal attack on Judge Lake is irrelevant here. The Supreme Court addressed its personal attack doctrine to the bias, or appearance of bias, of the judge; even if it could be somehow proved with certainty that Nakell *did* encourage and directly cause Hatcher's tantrum, that fact would have no bearing on the issue of Judge Lake's possible bias against Nakell. His bias against Nakell could be quite strong even if it were based upon a faulty understanding of what inspired Hatcher's

misconduct. This court properly should impute Hatcher's personal attack on Judge Lake to Nakell precisely because Judge Lake himself so imputed it. Thus, the personal attack on Judge Lake that occurred at the November 14th hearing required a recusal. By adjudicating the contempt himself, Judge Lake violated Nakell's due process rights under the Fourteenth Amendment. Therefore, the Fourth Circuit should grant Nakell's petition for a writ of habeas corpus. That by no means, relieves Nakell of a need to litigate the question of contempt. It would only assure his constitutional right of an impartial judge.

Furthermore, as the Supreme Court has explained, even if the "contemptuous

conduct [falls] short of personal attack, [it] may still provoke a trial judge and so *embroil him in controversy* that he cannot 'hold the balance nice, clear and true between the State and the accused."' *Taylor*, 418 U.S. at 501 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)) (emphasis added), *see also* 3 Charles Alan Wright, *Federal Practice and Procedure: Criminal 2d* § 713, at 863-64 (2d ed. 1982) ("If this is so, another judge must try the contempt charge.") (citing *inter alia Taylor*, 418 U.S. at 501-02).

"In making this ultimate judgment, the inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold

the balance between vindicating the interests of the court and the interests of the accused."' *Taylor*, 418 U.S. at 501 (quoting *Ungar v. Sarafite*, 376 U.S. 575,588 (1964)). "'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less." *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).*

Unlike the "personal attack"

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* Given the Supreme Court's teaching of the appropriateness of a judge's recusal in circumstances such as those presented by the instant case, *In Re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), decided by the First Circuit a decade before *Mayberry* and *Taylor* and relied on by the majority, seems a slim reed indeed.

doctrine applied above, the line of due process cases dealing with judges' "embroilment" requires an appellate court to review both the contemnor's conduct *and* the judge's response to that conduct. *See Taylor*, 418 U.S. at 503 n.10.

An examination of the record before us leaves little doubt that Judge Lake became personally embroiled in a running controversy with Nakell and Nakell's client. The evidence regarding Nakell's conduct (and Hatcher's conduct, to the extent that the judge held Nakell responsible for it) has been reviewed above. Judge Lake's response to Nakell's conduct also suggests that the judge had become embroiled in a running controversy with Nakell and Hatcher. Between the hearings of November 14th and 16th, Judge

Lake granted an interview to the *Raleigh News and Observer*, in which he flatly stated that "'Mr. Nakell had been disruptive of the proceedings, pandering to the audience and the defendant and encouraging Mr. Hatcher to be disruptive."' J.A. 99-100 (quoting the newspaper article). At the November 16th hearing, the judge acknowledged the interview and the accuracy of the quotation. *See* J.A. 100.

The words of the article, fairly read, appear to be preliminary conclusions of fact, not mere recitations of the charges. Judge Lake conveyed these statements to the press *before* he sat in judgment on the contempt charge. Neither the public nor any defendant can remain confident in the impartiality of a

tribunal when the tribunal itself has already convicted the defendant in the press. *See McClendon v. Clinard*, 38 N.C.App. 353, 247 S.E.2d 783, 784-85 (1978) (reversing a trial judge's dismissal of a motion to recuse, in part because the judge had given an interview to a reporter about an incident involving the plaintiffs' attorney); *Suter v. State*, 588 P.2d 578, 580-81 (Okla. Crim. App. 1978) (holding that a contempt proceeding should have been conducted before a different judge in part because the magistrate gave an interview to a newspaper before the final contempt proceeding); *cf. Ungar*, 376 U.S. at 587-88. Judge Lake's press statement created at least the appearance that he was so personally embroiled in the

controversy as to compromise his impartiality, and therefore the Due Process Clause mandated a recusal. *See Taylor*, 418 U.S. at 501. Because Judge Lake was both personally attacked and embroiled in controversy with Nakell, his bias--or at least appearance of bias--warrants the granting of Nakell's petition for the writ of habeas corpus.

Therefore, I respectfully dissent.

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 4, 1994

No. 92-6226
CA-92-89-HC-H

BARRY NAKELL
Petitioner - Appellant

v.

ATTORNEY GENERAL
OF NORTH CAROLINA

Respondent - Appellee

NORTH CAROLINA ACADEMY OF TRIAL LAWYERS;
NORTH CAROLINA CIVIL LIBERTIES
UNION-LEGAL FOUNDATION

Amici Curiae

O R D E R

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing. Entered at the direction of Chief Judge Ervin, with the

concurrence of Judge Wilkins. Judge Murnaghan dissents from the decision to deny the petition.

For the Court,

/s/ Bert M. Montague